IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8431 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAGDISH HAIR CUTTING SALOON

Versus

AHMEDABAD MUNI. CORPN.

Appearance:

MR PS PATEL for Petitioner

NOTICE SERVED for Respondent No. 1

MR PRASHANT G DESAI for Corporation

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 20/10/2000

ORAL JUDGEMENT

#. Jagdish Hair Cutting Saloon, the petitioner has challenged the order dated 23.11.88 passed by Assistant Town Development Officer of Ahmedabad Municipal

Corporation wherein he has rejected the application of the petitioner for regularising the construction.

#. The facts of the case giving rise to the present petition are as under.

#. There is a piece of land admeasuring 10x10 feet situated in Krushvan Society at Naranpura, Ahmedabad. From the record it appears that one Vimlaben Ramanlal Shah is the owner of the property along with the said property. Shri Jagdish Hair Cutting Saloon, the petitioner has taken on rent a piece of land admeasuring 10x10 feet (suit land) from its owner Vimlaben Ramanlal Shah. The petitioner, thereafter, constructed a wooden cabin on the said land and is running hair cutting saloon in the said cabin.

#. The Ahmedabad Municipal Corporation, the respondent herein issued a notice dated 27.11.1980 under the provisions of Section 260(1) of Bombay Provincial Municipal Corporation Act, (hereinafter referred to as Act) and was alleged that construction of the cabin was unauthorised as construction is without permission of the respondent-Corporation and so the petitioner was asked to show cause as to why same should not be demolished.

#. It appears that thereafter some oral discussion took place between the petitioner and the officer of the respondent No.2. However, the respondent ultimately issued notice dated 23.3.1982 lying on the floor of the petitioner's shop, which was issued under the provisions of Section 262(2) of the Act and thereby the petitioner was directed to remove the said cabin.

#. It appears that thereafter the plaintiff has issued statutory notice to the Corporation and contended that since 1978 a cabin is raised on the private land and so the respondent Corporation has no right to issue such order which was alleged that it was a policy of the defendant corporation not to demolish such construction which are raised before the year 19 75. From the record it appears that after issuance of the statutory notice plaintiff filed a Civil Suit No.2559 of 1982 before the Hon'ble City Civil Court at Ahmedabad.

#. From the record it appears that before the City Civil Court the Corporation stated that the Corporation received a complaint that unauthorised construction has been carried out on the suit land and so the Inspector of the defendant corporation visited the site on 1.8.1980 and verified that the constriction consisting of walls

made of bricks and cement and with roof of A.C. sheet and submitted his report accordingly to the defendant Corporation. Thereafter, the Deputy T.D.O. verified the fact and having come to the conclusion that the petitioner has carried out construction without permission of the defendant corporation and also contrary to the bye-laws of the Corporation. It was submitted before the City Civil Court that a show cause notice dated 19.8.1980 was issued to the petitioner which was served on the petitioner on 4.12.1980. A show cause notice was also issued to landlord also. It was also stated that the petitioner submitted explanation dated 1.12.1980 stating that the petitioner has carried out construction legally and should be given time to produce evidence and he was given one month's time. However, the petitioner did not produce any evidence and again given intimation to produce evidence if any by letter dated 3.8.1981. The petitioner wrote a letter on 25.8.1981 only stating that the said cabin is very old as the explanation was not forthcoming that the Deputy T.D.O. took a decision on 5.12.1981 for removal of the said unauthorised construction and passed an order and served upon the petitioner on 23.3.1982. It was submitted that the petitioner has no cause of action and it was denied that it is a policy of the Corporation to remove cabin which was in existence prior to 1975. It was further submitted that the Corporation has got power to recover the municipal taxes even in respect of unauthorised construction and so even if the petitioner has paid taxes, it will no bearing upon the legal position so the petitioner has no cause of action and the suit be dismissed with costs.

#. In view of the pleadings of the City Civil Court at Ahmedabad by its judgment and order dated 8.1.1987 was pleased to hold that the plaintiff failed to prove that the suit construction on the suit land did not have a requisite permission and petitioner failed prove that notice issued by the Corporation under Section 260(2) of the Act is illegal. Ultimately in the operative portion the City Civil Court pleased to observe as follows :-

"The suit stands dismissed. But the injunction issued against the defendant Corporation shall in force till 31.12.1988 so as to enable the plaintiff to move the defendant Corporation for regularising the suit construction if it is permissible as per the Rules and Regulations of the defendant Corporation. The parties shall bear their own costs. Decree accordingly.

Directed and pronounced in the open Court today
this 8th day of January, 1987".

#. Pursuant to the aforesaid order of the Hon'ble City Civil Court the petitioner made representation on 29.10.1988 for regularising the said construction.

##. The Assistant Town Development Officer by his communication dated 23.11.1988 pleased to reject the said representation.

##. Being aggrieved and dissatisfied with the said order of the Assistant Town Development Officer, present petition was filed before this court.

##. On 21.12.1988 this matter came up for hearing and this court passed the following order :-

"Rule. Interim relief in terms of para 11(C)".

That is the respondent authority was directed to permit the petitioner to do his business at suit premises.

##. Shri P.S.Patel, learned advocate for the petitioner has challenged the order of authority on several grounds. One of the grounds was that the T.D.O. has not given any reason in support of rejecting the prayer of the petitioner. The T.D.O. has not considered factual aspect of the matter before rejecting his prayer for regularisation.

##. On behalf of the original owner Ms.Ketty Mehta appeared, on behalf of the Corporation Shri P.G.Desai appeared for Corporation. Learned counsel for the Corporation submitted that in this case prior to rejection of the regularisation there was already a suit filed by the plaintiff being Suit No.2559 of 1982 and in that case the judgment and order dated 8.1.87 passed by learned Judge, Court No.10, City Civil Court at Ahmedabad. In that suit plaintiff has raised contention in which Corporation filed written reply at Exh.6 and after considering the said written submissions the learned City Civil Judge has given very cogent and convincing reason and rejected all contentions of the plaintiff. However, with a view to give one chance to the petitioner the learned Judge has observed that the petitioner can move the Corporation for requesting the said construction if it permissible as per the rule and regulation of the respondent Corporation and in view of the same after considering this representation the

Corporation is pleased to reject the said representation and the same is in accordance with law and the petitioner had no right much less legal right to continue on the said suit land as construction of the petitioner was unauthorised and illegal.

##. Section 260 of the Bombay Provincial Municipal Corporation Act, 1949 reads as under :-

"Proceedings to be taken in respect of building or work commenced contrary to rules or by-laws :-

(1) If the erection of any building or the execution of any such work as is described in section 254 is commenced or carried out contrary to the provisions of the rules or by-laws, the Commissioner, unless he deems it necessary to take proceedings in respect of such building or work under section 264, shall :-

(a) by written notice, require the person who is erecting such building or executing such work or has erected such building or executed such work on or before such day as shall be specified in such notice, by a statement in writing subscribed by him or by an agent duly authorised by him in that behalf and addressed to the Commissioner, to show sufficient cause why such building or work shall not be removed, altered or pulled down, or

(b) shall require the said person on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorised by him in that behalf, and show sufficient cause why such building or word shall not be removed, altered or pulled down

(2) If such person shall fail to show sufficient cause, to the satisfaction of the Commissioner, why such building or work shall not be removed, altered or pulled down, the Commissioner may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person"

##. The learned counsel for the corporation has relied

upon the judgment of this court in case of Empire Construction & Hotel Co. Ltd. Vs. A.M.C. reported in 1995(2) GLR 1297 :-

"Therefore, the Municipal Commissioner was authorised to take proceedings against the petitioner under Sec.260 of the said Act and the impugned order falls within the powers conferred on the Municipal Commissioner under the said Act. The expression "Commissioner may remove" appearing in Sec. 260(2) of the said Act does not authorize the Commissioner not to take action in cases where no sufficient cause is shown and the contravention of provisions of the Rules or Bye-laws is established. IN other words, it would not be open for the Commissioner to arbitrarily decide as to against whom action should be taken and against whom it should not be taken. The discretion, if any, under sub-section (2) of Section 260 cannot be arbitrarily exercised and the Commissioner is required to function keeping in view the purpose underlying the said provision, namely, removal of building or work which is found of be in contravention of the Rules or Bye-laws. From inaction, if any, in cases similar to that of the petitioner's building, it cannot be inferred that the Municipal Commissioner has taken any decision not to proceed against other similar breaches of Rules or Bye-laws."

##. The learned counsel for the petitioner also relied upon another judgment of this Hon'ble Court in the case of Yogeshbhai D. Sheth V. Ahmedabad Municipal Corporation, 1996(3) GLR 416 it is submitted that the decision is taken not to regularise the unauthorised construction with a view to remove the public nuisance and inconvenience which will be hardly a ground for this court to protect such wrong doer.

##. I have given my anxious consideration and in my view the petitioner has no legal right to continue with the same because the learned Civil Judge when the suit was filed as considered that aspect in this behalf and in spite that even though application was rejected. Till today the petitioner is continuing his business in this behalf. So, practically since 12 years the petitioner has been enjoying the suit land under interim relief of this court.

##. In view of the order of TDO is absolutely

discretionary order under Article 226 of the Constitution of India, I do not find any error apparent on the record of the case to interfere with in this behalf. Thus, the petition is dismissed in the interest of justice no order as to costs. Rule discharged. However, in the interest of justice the respondents may not execute with Section 260(2) of the B.P.M.C.Act of the suit premises till three months i.e. 31.12.2000.

(K.M.Mehta, J.)

*Pvv

20.10.2000.